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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

Misc. No. 222

ESTHER J. MICHEL (as representing Albert P. Michel, deceased, and in her own behalf),
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, UNIVERSITY OF CALIFORNIA, and STATE COMPENSATION INSURANCE FUND,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Subject Index

	Page
Jurisdiction	2
The facts	2
The position of respondent Commission	8

Table of Authorities Cited

Cases

	Page
Ruiz v. Ind. Acc. Com. (1955), 45 Cal. 2d 409	5
Winthrop v. Ind. Acc. Com. (1931), 213 Cal. 351	9

Codes

Labor Code, Section 5406	5
28 U.S.C., Section 1257(3)	2

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner has asked this Court to review an order of the California Industrial Accident Commission denying workmen's compensation benefits for the last illness and death of her husband.

The order was based on a finding that the evidence did not establish that petitioner's husband sustained any injury arising out of and in the course of his employment, and that it did not establish that his death was caused by any injury arising out of and in the course of his employment.

JURISDICTION.

The order of the California Supreme Court denying Mrs. Michel's petition for a rehearing was made and entered June 26, 1957.

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1257 (3).

It is obvious that petitioner has failed to comply in numerous respects with the statutes and the rules of this Court pertaining to a petition for a writ of certiorari. Petitioner has failed to file the certified record of the court whose decree is sought to be reviewed within the 90 day jurisdictional period. Therefore, it appears that petitioner's application for a writ of certiorari is out of time and should be denied for that reason alone.

THE FACTS.

On June 20, 1949, while petitioner's husband was alive, he filed an application for workmen's compensation benefits against the University of California, claiming that he had become disabled by "injurious

radiation from radio-active materials." As the "date of injury" he designated "between January 1944 and May 1945."

A hearing was held in the employee's home on August 26, 1949. The referee who presided at this hearing issued an order taking the case off calendar pursuant to the consent of the parties. The referee's report observed, "The applicant apparently had some difficulty in marshalling his medical evidence . . ." The order and report were filed and served on the parties on November 3, 1949.

Two days later, on November 5, 1949, the employee died.

More than six years later, on December 6, 1955, his widow filed a claim. This did not specify whether it was for a death benefit or for compensation or medical expense which might have been due to the husband.

A death certificate was introduced in evidence. In the space headed "Disease or Condition Directly Leading to Death" was entered "Aplastic anemia, chronic." In the next space, headed "Due To" was entered "Unknown cause".

Dr. Edward A. Baker, on behalf of widow, testified. His testimony was summarized by the referee as follows:

> "That his specialty is internal medicine. He has passed the first examination for the Board.
>
> "He examined the deceased. It was only from the history that the decedent gave him that wit-

ness was able to tell that decedent was in contact with radioactivity. The only way a person would know generally that he was exposed to radioactivity would be that he would wear a badge. The only showing of exposure to radioactivity in decedent's case was the history and kind of disease he had. Witness noted that the deceased has been employed at Oakridge and that would be a logical place to determine whether there was an exposure to radioactivity and it would be logical to assume that there was such exposure in the light of decedent's disease. The latter died from a fibrosis replacement of the bone marrow, the red cells not being formed. Exposure to X-rays could have created this disease. In the majority of cases, this condition is considered to be of a toxic nature. Another cause is tumors, which was ruled out in this case. Another cause would be liver disfunction which did not exist in this case. A common toxin is benzine; another is arsenic; another, phosphorus. There are not many reportable cases of the instant kind. Witness couldn't give an opinion as to whether the deceased was exposed to radioactivity from the University of California. It was his impression that the deceased didn't know whether there was exposure there. The diagnosis in the instant case is consistent with the history of exposure to radioactivity. The time formation is the most important factor in this kind of case. Witness believes that the disease had its onset before 1948 and considering an exposure at Oak Ridge, the time sequence, that is, the development of symptoms three years from such exposure, would indicate that the disease was caused by such. Where there is a manifestation of the disease from a year and

a half to two and a half years after exposure, it is pretty likely that the disease was caused by the exposure. When the decedent was first seen by the witness, the former was chronically ill and had been for some time. When he left the University of California, the decedent had evidence of a mild anemia. This is what witness based some of his conclusions on. It was witness' opinion that the anemia began in 1945.

"Witness read from the report contained in a letter from Oak Ridge and which is part of the medical file in basing his opinion that decedent was exposed to radioactivity."

The referee held that the widow's claim was barred, citing *Labor Code*, Section 5406 and *Ruiz v. Ind. Acc. Com.* (1955), 45 Cal. 2d 409.

The widow filed a Petition for Reconsideration, which the Commission granted.

At a hearing held after reconsideration had been granted, Wilfred S. Bigelow, personnel manager of the radiation laboratory of the University of California, testified. The referee summarized his testimony as follows:

"*Wilfred S. Bigelow*, called by the defendants, testified that he has been personnel manager of the radiation laboratory of the University of California since June 1942, and that Albert Michel was employed from January 10, 1944 to May 11, 1945 as a mechanic. He worked with a group of mechanics doing re-assembly work. He was not classifiable as a machinist and was considered a mechanic because he assembled parts of mechanical equipment only.

"Witness was at Oak Ridge, Tennessee between October 1944 and December 1944. The decedent worked in Alpha No. 2 Group there with a group of mechanics.

"On his place for prior employment on his application, the decedent gave Richmond Shipyard as his next prior place of employment and his occupation there as welder and gave as his reason for leaving as his health and mentioned the weather. There was also a record of him having previously worked for a long period of approximately thirty years at the General Electric Company plant at Erie, Pennsylvania."

Burton J. Moyer also testified. His testimony was summarized as follows:

"*Burton J. Moyer,* called by defendants, was sworn and testified that he is a physics professor in the Physics Department of the University of California, and also health physicist at the Radiation Laboratory. He is a doctor of philosophy, obtaining that degree in 1939 in physics.

"He was a physicist at the radiation laboratory at Oak Ridge in the latter part of 1944 and in 1945 up to August, at which time the decedent worked there. It was a portion of the Alpha Two operations Research Group. They were engaged in separating isotopes of uranium, and the witness had with him a sample of pure uranium of about the size of one cubic inch.

"He said that the decedent did not handle any dangerous compounds of uranium containing gamma or x-rays and had no exposure considered dangerous. He had no contact with machinery that had been blown apart or that had been ex-

posed to radiation. He said that the testimony of applicant regarding the machines having been blown apart was a misconception and that the process was a slow electrical or magnetic process.

"Also in the same group was Dr. Frank Oppenheimer and Dr. Victor Anderson. There was no nuclear reaction involved in the decedent's work.

"Cross-examined, he said he was in the same group as the decedent but did not work with him. However, witness said he did do assembly work on occasions and saw the decedent frequently but not constantly.

"He denied that the applicant worked in any process of blowing up machines or handled blown-up machines, but said he took machines apart and re-assembled them.

"He was not always on the same shift as the decedent.

"He is well acquainted with a book referred to by applicant's representative entitled 'Peaceful Uses of Atomic Energy.' Applicant's representative read a paragraph from page 579 of said work and the witness said he would not dispute the contents thereof as general statements. He is also acquainted with a work entitled, 'Acute Radiation Syndrome,' and uses it as a reference. He is not familiar with a book entitled 'Hiroshima Diary.' He is slightly familiar with the report of the Los Alamos laboratory on 'Effects of Atomic Weapons.' He does not recall having read the reports of the British and United States Societies dated June 12, 1956.

"He does not recall seeing the decedent after he left the University of California employment.

"They did not use a material known as strontium at the Oak Ridge Group.

"There were certain minor safety rules in effect at the time of decedent's employment but not the rigid safety rules which are now in effect, but which cover a completely different situation."

On January 17, 1957, two Commissioners of Panel One of the Industrial Accident Commission signed an order denying benefits. The order was based on findings that the evidence did not establish that the decedent had sustained any injury arising out of the employment.

Petitioner filed a petition asking that the Commission make a finding as to the cause of death and for a further hearing to prove that the decedent had been furnished treatment by the University, as distinguished from the State Compensation Insurance Fund.

This petition was denied. Petitioner then filed the Petition for Review by the State District Court of Appeal and the State Supreme Court, both of which were denied.

THE POSITION OF RESPONDENT COMMISSION.

It is the position of the respondent Commission that the testimony of the witnesses Bigelow and Moyer, summarized above, supports the finding that the decedent did not sustain any injury arising out of his employment.

It is true that if the opinion of Dr. Baker could be accepted as correct, it would support a contrary finding. However, Dr. Baker's knowledge of the working conditions was obtained from the employee. If this was faulty, as it was shown to be by the testimony of the employee's superiors, Dr. Baker's opinion, of course, must fall.

Winthrop v. Ind. Acc. Com. (1931), 213 Cal. 351, 355.

It is respectfully submitted that the findings of the Commission and its consequent order denying benefits are supported by the evidence, that there was no lack of due process of law, and that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
October 23, 1957.

Respectfully submitted,
EVERETT A. CORTEN,
Attorney for Respondent Industrial Accident Commission of the State of California.

DANIEL C. MURPHY,
Of Counsel.

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vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, UNIVERSITY OF CALIFORNIA, and STATE COMPENSATION INSURANCE FUND,

Respondents.

BRIEF FOR RESPONDENT STATE COMPENSATION INSURANCE FUND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA INDUSTRIAL ACCIDENT COMMISSION.

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Subject Index

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Constitutional provision involved	3
Statement of the case	3
Specification of errors urged by petitioner	7
Argument	8
Conclusion	13

Table of Authorities Cited

Cases

	Pages
Bailey v. Anderson, 326 U.S. 203	11
Liberty Mut. Ins. Co. v. Ind. Acc. Com. and Serafin (1948), 33 Cal. 2d 89	12
Lumbermen's Mut. Cas. Co. v. Ind. Acc. Com. and Cacozza (1946), 29 Cal. 2d 492	12
Ruiz v. Ind. Acc. Com. (1955), 45 Cal. 2d 409	5, 9

Constitutions

California Constitution, Article XX, Section 21	8

Codes

California Code of Civil Procedure, Section 1963 (15)	12
California Labor Code:	
Section 5313	8
Section 5406	5, 8, 9, 11
Section 5800.5	8
Section 5904	10, 11
28 U.S.C., Section 1257 (3)	2

Texts

36 C.J.S. 178, Section 274	11
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, by Wolfson and Kurland, p. 118, Section 66	11

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BRIEF FOR RESPONDENT STATE COMPENSATION INSURANCE FUND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA INDUSTRIAL ACCIDENT COMMISSION.

OPINION BELOW.

The California Industrial Accident Commission made and entered its Order without opinion denying

workmen's compensation benefits to petitioner, Mrs. Michel, on March 1, 1957. The California District Court of Appeal denied Mrs. Michel's petition for a writ of review without opinion on April 3, 1957. The California Supreme Court denied Mrs. Michel's petition for a hearing without opinion on May 29, 1957.

JURISDICTION.

The order of the California Supreme Court denying Mrs. Michel's petition for a rehearing was made and entered June 26, 1957.

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1257 (3).

It is obvious that petitioner has failed to comply in numerous respects with the statutes and the rules of this Court pertaining to a petition for a writ of certiorari. Petitioner has failed to file the certified record of the court whose decree is sought to be reviewed within the 90 day jurisdictional period. Therefore, it appears that petitioner's application for a writ of certiorari is out of time and should be denied for that reason alone.

QUESTION PRESENTED.

Has petitioner any valid ground for contending that the California Industrial Accident Commission violated the due process clause of the United States Con-

stitution in denying workmen's compensation benefits to her?

CONSTITUTIONAL PROVISION INVOLVED.

This case purports to involve the due process clause of the 14th amendment to the United States Constitution.

STATEMENT OF THE CASE.

Since petitioner, Mrs. Michel, has not stated in her petition all of the procedural and other material facts in the record, and it is necessary to first do so in order to answer the points raised by petitioner, it becomes necessary to state such facts as briefly as possible.

On June 20, 1949, the deceased employee, Albert P. Michel, filed his application with the California Industrial Accident Commission seeking workmen's compensation benefits. He claimed benefits by reason of disability due to a disease which he alleged was caused by radiation from radioactive materials while in the employ of the University of California between January, 1944, and May, 1945. Respondent State Compensation Insurance Fund was the insurance carrier.

A hearing was held before a referee of the Commission on August 26, 1949 at which the only evidence adduced was Mr. Michel's testimony. He testified that he worked for the University of California at Oak Ridge, Tennessee, between September 2, 1944 and February 14, 1945 as an assembler of machines which

the scientists had experimented on and blown to pieces. He testified that he did not know the nature of the experimental work or what the machines were for.

The case was ordered "Off Calendar" by a referee of the Commission on November 3, 1949 at the request of Mr. Michel's attorney.

Following the death of Mr. Michel on November 5, *1949*, the widow and his only dependent, petitioner Esther J. Michel, filed an application for workmen's compensation benefits over 6 years later on December 6, *1955*. This application was considered by the Commission as including a claim not only for death benefits, but also for disability indemnity claimed to be accrued and owing to the deceased employee, Mr. Michel, at the time of his death.

A hearing was held March 29, 1956 at which Mrs. Michel testified, and also Dr. Edward A. Baker in her behalf. The *written report of Dr. Baker*, dated January 26, 1956, the Alameda County Highland Hospital record and the death certificate were *received in evidence* as the applicant's exhibits.

Mrs. Michel has set forth a part of Dr. Baker's written opinion but has omitted any summary of Dr. Baker's testimony in her petition. Dr. Baker's written opinion and testimony, the hospital record and the death certificate are to the effect that Mr. Michel had been suffering from an anemic condition which ultimately resulted in his death. Dr. Baker testified that said disease and death could well have been caused by Mr. Michel's employment at Oak Ridge *provided* that it was true that he had been exposed to radiation in

such employment. However, he also testified and stated in his written opinion that in the majority of cases such anemic condition is considered to be of a toxic nature.

On April 17, 1956, a referee of the Commission issued a decision denying benefits to Mrs. Michel because *both* her claim for death benefits and her claim for accrued disability indemnity were barred by the Statute of Limitations. In the decision, the referee found that the date of alleged injury, that is, under California law, when disability occurred, should be considered to be December 22, *1948*.

On June 6, 1956, the Commission granted Mrs. Michel's Petition for Reconsideration because it was of the opinion that, although the claim for death benefits was barred by reason of California Labor Code, Sec. 5406, and the decision of the California Supreme Court in *Ruiz v. Ind. Acc. Com.* (1955), 45 Cal. 2d 409, the claim for accrued disability indemnity was not.

A further hearing was held on July 9, 1956 at which a letter to Mrs. Michel from her attorney, and a letter from said attorney to the Commission, were put in evidence by Mrs. Michel. The letter to Mrs. Michel stated that the attorney had received a report from a pathologist that Mr. Michel in all probability had died of Hodgkin's Disease which had no connection with radiation.

Also, at said hearing, in addition to further testimony by Mrs. Michel, Wilfred S. Bigelow, personnel manager of the University of California, testified that

he was at Oak Ridge, Tennessee, at the time Mr. Michel had worked there, and that Mr. Michel was employed as a mechanic.

Dr. Burton J. Moyer, professor of physics at the University of California, and health physicist at the radiation laboratory, also testified that he was at Oak Ridge at the same time that Mr. Michel was there, and, in fact, worked in the same group with Mr. Michel and saw him frequently. Dr. Moyer further testified that Mr. Michel was not exposed to any radiation, nor did he come in contact with any machinery or other material exposed to radiation. He stated that Mr. Michel's testimony that he had worked on machines that had been blown apart was a misconception because the machines had been used only in a slow electrical or magnetic process.

The referee who presided over the said final hearing, in reporting to the Commission on November 28, 1956, recommended that the Commission find that Mr. Michel had not sustained an industrial injury (which term under California law includes disease), or death resulting therefrom.

On January 17, 1957, the Commission issued its Decision After Reconsideration finding that the evidence in the record neither established that the employee had "sustained any injury arising out of and occurring in the course of" his employment, nor that his death was caused by any such injury. The Commission therefore decided that Mrs. Michel was not entitled to any death benefits or accrued temporary disability indemnity, and further decided that her claim for death benefits was barred by the Statute of Limi-

tations although the claim for temporary disability indemnity was not barred. In its Report accompanying its decision, the Commission stated that it had reviewed the record.

On January 30, 1957, Mrs. Michel petitioned for a reconsideration of the Commission's decision, and, on March 1, 1957, the Commission denied the petition, stating again in its Report accompanying the denial order that it had reviewed the record, and that the record sustained its Decision After Reconsideration.

SPECIFICATION OF ERRORS URGED BY PETITIONER.

Although difficult to sort them out, it appears that petitioner's contentions (Petition, pp. 7-9, 14) with respect to which the California Industrial Accident Commission violated due process of law may be summarized briefly as follows:

1. A referee and *presumably* the Commission omitted to read the transcripts of the testimony of the decedent employee, Mr. Michel, and of Dr. Baker.

2. The Commission excluded the written medical report of Dr. Baker from consideration.

3. The Commission did not liberally construe the workmen's compensation statutes of California.

4. Although the Commission found that the deceased employee had not sustained any job-connected injury, disease, or death, the Commission did not make a finding as to the date of injury or the cause of death.

5. That petitioner's claim for death benefits was not barred by the Statute of Limitations, and that

California Labor Code, sec. 5406, requiring that a claim for death benefits be filed within 240 weeks from the date of injury violates section 21 of article XX of the California Constitution.

6. The Commission violated California Labor Code, secs. 5313 and 5800.5, because it did not have jurisdiction to make its final decision denying compensation benefits for the reason that the decision was made more than 30 days after the case was submitted for decision.

ARGUMENT.

It is obvious that points 3, 4, 5 and 6 raised by petitioner, as stated immediately above, do not involve federal questions and therefore call for little, if any, discussion. Point 3 certainly does not require any comment.

As to point 4, the Commission did make a finding that the injury or disease, and the death resulting therefrom, were not job-connected. It was therefore unnecessary to make a finding that the deceased employee, Mr. Michel, had suffered from an anemic condition which ultimately resulted in his death. The Commission did also make a finding that the date of injury, that is, the date when disability occurred, and which commenced the running of the Statute of Limitations, was December 22, 1948.

With respect to point 5, and the barring by the Statute of Limitations of petitioner Mrs. Michel's claim for death benefits, California Labor Code, sec. 5406, provides:

> "No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks after the date of injury."

Mrs. Michel's claim for death benefits was clearly barred by sec. 5406 and within the ruling laid down by the California Supreme Court in the case of *Ruiz v. Ind. Acc. Com.* (1955), 45 Cal. 2d 409, 414, because her application was filed with the Commission almost 7 years after the date of injury, and over 6 years after Mr. Michel's death, considerably over the time limits and the conditions required for the filing of such a claim by Labor Code, sec. 5406.

In the *Ruiz* case, the Court stated that such "time limitation appears to be not a normal statute of limitations, but rather to be more in the nature of a qualifying condition in the exercise of any right to death benefits"; and the widow's right "to recover death benefits is wholly statutory, and her constitutional objection has no bearing on the issue." Since it is not a normal statute of limitations, it may not be waived.

Mrs. Michel's contention that Labor Code, sec. 5406, violates a section of the *California* Constitution clearly does not raise a federal question. Furthermore, the California Supreme Court ruled against a similar contention in the *Ruiz* case.

Mrs. Michel does not have a valid point on the Statute of Limitations with respect to the alleged, accrued disability indemnity as distinguished from the death benefit claim because the Commission *did* find that the disability claim was not barred by the Statute.

However, the Commission denied the disability benefit to Mrs. Michel because the record established that Mr. Michel's injury and death were not industrial. Of course, Mrs. Michel would not have a claim of any kind if the injury and death were not industrial, and there is clearly and definitely substantial evidence in the record to support the Commission's decision that the injury and death were not job-connected. Mrs. Michel's entire claim is based upon the contention that Mr. Michel was exposed to radiation while employed by the University of California at Oak Ridge, Tennessee. Dr. Moyer was certainly a highly competent and qualified witness who testified in that regard. His testimony alone is sufficient to sustain the Commission's decision.

As to point 6 made by petitioner Mrs. Michel that the Commission did not make its decision until more than 30 days after the submission of the case, this clearly also does not raise a federal question. Furthermore, this point was not made by Mrs. Michel before the Commission prior to her petitions to the appellate courts of California as required by California Labor Code, sec. 5904.

Even if it is assumed that said final decision of the Commission was void and that the Commission had no jurisdiction to make it after the 30 day period, this would not assist Mrs. Michel for in that case the prior order of the Commission denying benefits to her would be final.

By points 1 and 2, petitioner Mrs. Michel contends that the Commission violated due process because a referee and *presumably* the Commission omitted to

read the transcripts of the testimony of Mr. Michel and of Dr. Baker, and that the Commission excluded the written medical report of Dr. Baker from consideration. At the outset, it should be pointed out as a sufficient answer to these contentions that neither of said two points were raised before the trial court, the California Industrial Accident Commission. In fact, none of the said six points set out by Mrs. Michel in her petition to this Court were raised before the Commission with the exception of the contention that the Commission should have made a finding that Mr. Michel suffered from an anemic condition, and died as a result thereof, in addition to the finding that the Commission did make to the effect that Mr. Michel's disease, injury and death were not job-connected. Otherwise, the only points raised by Mrs. Michel before the Commission pertained to the Statute of Limitations and California Labor Code, sec. 5406. Under the provisions of California Labor Code, sec. 5904, Mrs. Michel could not raise any points before the appellate courts of California which were not contended before the Industrial Accident Commission.

This being the case, it is well settled that the jurisdiction of this Court cannot be invoked where the alleged federal questions involved were not raised before the trial court, that is, the California Industrial Accident Commission.

Baldwin v. Anderson, 326 U.S. 203, 207;

Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, by Wolfson and Kurland, p. 118, sec. 66;

36 C.J.S. 178, sec. 274.

Petitioner makes the bald assertion without any supporting citation from the record whatever that a Commission referee and presumably the Commission omitted to read the transcripts of the testimony of Mr. Michel and of Dr. Baker, and that the Commission excluded from consideration the written medical report of Dr. Baker which had been admitted in evidence as a part of the record before the Commission.

It should be first noted that it was the Commission and not a referee thereof that made the final decision denying benefits to Mrs. Michel. With respect to the Commission, petitioner contends only that the Commission *presumably* omitted to read the transcripts. The presumption created by California law is quite to the contrary.

Not only has petitioner failed to establish otherwise, but the California law presumes that "official duty has been regularly performed" by the Commission, and it has been held that the Commission "is presumed to have made its decision on all the evidence."

> California Code of Civil Procedure, section 1963 (15);
>
> *Liberty Mut. Ins. Co. v. Ind. Acc. Com. and Serafin* (1948), 33 Cal. 2d 89, 92;
>
> *Lumbermen's Mut. Cas. Co. v. Ind. Acc. Com. and Carozza* (1946), 29 Cal. 2d 492, 501.

Furthermore, the vital issue before the Commission was whether Mr. Michel's anemic condition had been caused by any significant radiation that he had been subjected to while working for the University of California. In his testimony, Mr. Michel stated that he

did not know whether this was so. Dr. Baker testified that Mr. Michel's anemic condition could have been caused by his employment *provided* that it was true that he had been exposed to radiation in the employment. The testimony of Mr. Michel and Dr. Baker was not therefore determinative of the vital issue. On the other hand, the testimony of Dr. Burton J. Moyer, professor of physics at the University of California, and health physicist in the radiation laboratory was strong, substantial, and the most credible kind of evidence, to the effect that Mr. Michel was not exposed to any radiation during his employment.

CONCLUSION.

Accordingly, the petition filed herein for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 7, 1957.

Respectfully submitted,
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State Compensation Insurance Fund.

DONALD GALLAGHER,
T. GROTZINGER,
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